In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1712

IN RE GRAND JURY SUBPOENA SERVED UPON SIMON HOROWITZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners Alexander and Elizabeth Kasser seek review of the application by the court of appeals of the principles of *Couch* v. *United States,* 409 U.S. 322, to the facts of this case.

A federal grand jury in the Southern District of New York is investigating a complex series of international financial dealings to see whether federal statutes governing the use of the mails or channels of interstate or foreign commerce for fraud have been violated. In moving before the district court to quash a grand jury subpoena *duces tecum* served on their accountant, Simon Horowitz, for certain records he had stored in an out-of-state location, the claimants of the records (petitioners herein) contended that the subpoena was overbroad, that production of the records by their accountant would violate the attorney-client privilege, and that his disclosure of the papers would offend their privilege against self-incrimination. The contentions

were rejected in the district court, and on appeal the Court of Appeals for the Second Circuit, in a lengthy opinion by Chief Judge Friendly (Pet. App. 1a-28a), ordered the subpoena modified in certain respects but rejected the two privilege contentions.

Although the opinion of the court of appeals, upon which we rely (Pet. App. 19a-23a), fully answers petitioners' sole claim here—that the subpoenas directing the production of documents by a third party violated their privilege against self-incrimination—we direct the Court's attention to the following facts, which show that the case is now moot: On June 25, 1973, petitioners' application to this Court for an order staying enforcement of the subpoenas (Application A-1273) was denied.[1] The records subpoenaed have now been produced and are in the hands of the grand jury. As petitioners conceded in their application for a stay: "Enforcement of the subpoenas will moot the petition" (Application for Stay, p. 8). See, also, *United States* v. *Lyons*, 442 F. 2d 1144 (C.A. 1).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[1] Mr. Justice Douglas and Mr. Justice Brennan indicated that they would have granted the stay. The application for a stay was filed at the same time as the petition for a writ of certiorari.

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